UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8, MONTANA OFFICE
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FAX SHEET

DATE: April 18, 2000

TO: Chuck Figur MAIL CODE: 8ENF-L

FAX #: 303 312 6953

OFFICE: U.S. ENVIRONMENTAL PROTECTION AGENCY

FROM: Susan Zazzali

BRANCH: 8MO

SUBJECT:

COMMENTS:

Here be it

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April 12, 2000

Mr. J.T. Smith
Covington and Burling
1201 Pennsylvania Avenue N.W.
Washington, D.C. 20004

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RE: Violations of the Montana Hazardous Waste Act at ASARCO East Helena.

Dear Mr. Smith:

I have received and reviewed your letter of April 4, 2000, to Charles L. Figur. I regret that you did not feel you could present these concerns directly to me. Although our meeting was not successful in resolving the factual and legal issues that underlie the enforcement actions against ASARCO, I believe that our discussions of a settlement agreement, and our forays into negotiation, had some merit. You indicated in the course of that meeting, and again in your letter to Mr. Figur, that if presented with a legal basis (or bases) for the violations alleged to date, you would recommend settlement to your clients. Accordingly, I expatiate those bases below.

Table 1

Our discussions to date have largely involved Table 1 of Administrative Rules of Montana (ARM) 17.54.302. If you want a legal foundation for the violations alleged in the Department's enforcement action, you need look no further. ARM 17.54.302 defines "waste." ARM 17.54.302(1)(a) holds that a waste "is any discarded material that is not excluded by ARM 17.54.307(1)(b), (c), (d), (f), (g), (i), (j) or (k) or that is not reclassified upon application to the Department pursuant to ARM 17.54.328."

The process waters flowing from the limerock berms were not excluded by ARM 17.54.307(1)(b)[irrigation return flows], (c)[radon control], (d)[in-situ mining], (f)[domestic sewage], (g)[point sources], (i)[pulping liquor], (j)[spent sulfuric acid] or (k)[secondary materials *that are reclaimed and returned to the original process*]. The process waters at issue were clearly not excluded from the definition of "waste" pursuant to ARM 17.54.307(1)(b)-(j). The ARM 17.54.307(1)(k) exclusion is also inappropriate as to the process water because the water was lost to the environment and could not be "reclaimed." Finally, the process water released from the limerock berms has never been reclassified, and ASARCO has never sought reclassification from the Department, pursuant to ARM 17.54.328. Thus, the process water is

not excluded from the definition of "waste," and the next operative inquiry is whether the process water was "discarded material."

ARM 17.54.302(1)(b) states:

> "A discarded material is any material which is:
> (i) abandoned, as explained in (2) of this rule;
> (ii) recycled, as explained in (3) of this rule;
> (iii) considered inherently waste-like, as explained in (4) of this rule; or.
> (iv) a military munition identified as a waste in ARM 17.54.1303(1)."

As we discussed during our meeting, this material is clearly *not* being recycled if it is lost to the environment (ii). You argued during our meeting that this material is not inherently waste-like (iii). Finally, this material is clearly not a military munition (iv). In fact, the process water that is released from the limerock berms and that runs into the soils under ASARCO East Helena is abandoned by disposal into the environment (i).

If it is abandoned it is discarded, and if it is discarded it is waste. Therefore, the process water that escaped the limerock berms was waste, pursuant to ARM 17.54.302, and its disposal at ASARCO constitutes a violation of the Montana Hazardous Waste Act.

Basis for AMC discretion.

You state in your letter to Mr. Figur:

> "As I now understand it, Montana's position is that RCRA and implementing Subtitle C regulations vest the state with the authority to impose substantial civil penalties on ASARCO through an *ad hoc* definition of solid and hazardous waste. Drawing erroneously on language of the D.C. Circuit's decision in *AMC II*, Mark contends that any material that a regulator determines is not undergoing 'immediate' reuse and is becoming 'part of the waste disposal problem,' can be deemed a solid and hazardous waste. In Mark's view, it is irrelevant that the material may be a characteristic sludge or byproduct otherwise destined for legitimate reclamation. My protestations that Subtitle C of RCRA is implemented through notice and comment rulemaking and not thorough [sic] *ad hoc* determinations, apparently fall on deaf ears."

Your understanding of Montana's position, as reflected in this recapitulation, is not correct. First, Montana has never sought to impose an *ad hoc* definition of solid and hazardous waste upon anyone. It has never been disputed that the materials in the three-sided bins were solid and hazardous waste. The fact that they derive from a wastewater treatment system, and the fact that they were shown through sampling and analysis to exhibit the toxicity characteristic, are clear enough indications. When ASARCO promised to manage these wastes for legitimate

reclamation, the wastes earned an exemption from categorization as "discarded." It was ASARCO's subsequent mismanagement of these materials that caused them to be re-categorized as "discarded," not an instance of arbitrary regulatory fiat.

Second, the Department believes that the rule of *AMC II* (i.e., that hazardous waste destined for legitimate recycling is once again "discarded" if it is held out of the production process too long and becomes a part of the waste disposal problem) speaks to authority already vested in the Department and the EPA. Consider the Fourth Circuit's decision in Owen Electric Steel Co. v. Browner, 37 F.3d 146 (4th Cir., 1994). In this case EPA was found to have acted within its discretionary authority when it re-categorized waste destined for reclamation as "discarded" even though there was no associated "notice and comment rulemaking."

> "The EPA is justified in finding that, where a byproduct sits untouched for six months, it cannot be said that the material was 'never disposed of, abandoned, or thrown away.'" Id. at 150.

Owen Electric is particularly telling because, as with ASARCO, the secondary materials were allowed to sit, outside the production process, for at least six months. Your protests to the contrary notwithstanding, the Department does not seek to penalize *de minimus* violations of the "immediate reuse" standard with this enforcement action. Moreover, as we discussed at our meeting, the Department does not rely upon or in any way confuse the "immediate reuse" standard of *AMC II, Owen Electric, et al.*, with speculative accumulation timelines. Your continuing references to speculative accumulation merely obfuscate the operative standards attending the "discarded" status of wastes awaiting legitimate recycling.

Third, it *is* irrelevant for purposes of ascertaining whether a material is "discarded" that said material is a characteristic sludge or byproduct. In the context of reclamation under Table 1, both categories of materials are treated the same. It is also irrelevant that the materials are otherwise destined for legitimate reclamation. If they are "discarded" while awaiting such reclamation, they again become a "waste" and again fall subject to regulation.

Factual Divergence

You note in your letter to Mr. Figur:

> "Our discussions also highlighted that there is a divergence of factual perspective. Susan Zazalli [sic] believes that ASARCO's past practice allowed tens of thousands of gallons of potentially contaminated free liquids to escape containment. ASARCO, for its part, believes that Susan's figures are gravely exaggerated. Neither EPA, nor the State, has observed more than a trickle of liquid escaping the bins."

In fact, all three inspectors on the scene in November, 1998, characterize the quantity of free

liquid escaping the three-sided bins as "significant." The fact that the quantity of release was "significant" several days after optimum flow is also important. You have argued that there was a continuum of drying, over time ("This sludge, which was observed wet during a November inspection, was still located in the same area of the plant in May – although it had long since become dry"). Thus it is reasonable to conclude the flow through the limerock diminishes over time. You also seem to acknowledge that the limerock berms were intended, and indeed designed, to facilitate the de-watering of tank bottoms for recovery in the smelter. You do not argue that process water was not transmitted through the berms, you claim it was treated. Why provide a permeable barrier that allegedly treats wastewater unless you anticipate releases?

ASARCO seems to seek refuge in the notion that inspectors only observed water escaping containment on a limited basis. But the Department submits that these observations do not exist in a vacuum. They stand with past correspondence, documents produced in response to EPA's RCRA 3007 information request, and ASARCO's apparent inability to account for tens of thousands of gallons of hazardous process water. And, so far, the Department has only addressed itself to quantities of hazardous process waters associated with this particular batch of materials from the million gallon tanks. In short, the Department is confident that it can make its case that, at a minimum, tens of thousands of gallons of contaminated free liquids escaped containment.

Conclusion

The Department and the EPA remain confident in their enforcement actions against ASARCO. There was a clear violation of the terms of the federal consent decree and ASARCO has failed to advance any legitimate argument for the diminution or invalidity of the standing federal demand. The Table 1 violation, set forth above, is legally indefensible. ASARCO's claims of factual divergence are not compelling, and even if they were, they merely stand to vitiate the degree of the violation, without refuting the fact of the violation.

Finally, the Department is not persuaded that *AMC II* and its progeny represent inapplicable guidance in this case. However, the Department *is* mindful of your arguments that the facility is losing money and that this dispute concerns a purely historical practice. The Department is also anxious to put this matter to rest and move forward, in a cooperative mien, to LDR Phase IV.

In a good faith effort to foster flagging efforts at informal settlement, the Department is willing to reduce its demand to reflect elimination of the inner-bin violations. Thus, our only concern would be the waters released from the three-sided bins, and all of our debates concerning *AMC II* and its progeny could be set aside. This offer represents a dramatic reduction of the demand for consolidated (EPA and DEQ) case resolution from $228,000.00 to $105,000.00.

I remain confident that, in the event of settlement, we can address ASARCO's concerns for other materials destined for reclamation in the terms of a detailed settlement agreement. Please respond to this offer within the next five (5) business days.

Sincerely,

M. STEGER SMITH
Attorney Specialist
Department of Environmental Quality

cc: Mark Hall, DEQ AWMB
Kari Smith, DEQ ENFD
Susan Zazzali, U.S. EPA